Supreme Court, U.S.
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No. 07-

IN THE

Supreme Court of the United States

FRANCISCO LONDONO GUTIERREZ,

Petitioner,

v.

ALBERTO R. GONZALES, Attorney General,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should this Court grant certiorari to resolve the question of whether the regulatory scheme governing the filing of an asylum application for an alien in proceedings is contrary to the language and intent of Sec. 208 of the I.N.A.?

2. Should this Court grant certiorari to resolve the question of whether the Petitioner was deprived of his due process right to participate in a full and fair hearing on his asylum application as guaranteed by the 5th Amendment of the U.S. Constitution?

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Petitioner Francisco Londono Gutierrez respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the First Circuit (Pet. App. 14a) is unpublished. The First Circuit's judgment denied the petition for rehearing and rehearing en banc. The opinion of the Board of Immigration Appeals (Pet. App. 3a) is unpublished. The Opinion of the Executive Office for Immigration Review fro the Immigration Court at Boston Massachusetts (Pet. App. 8a) is unpublished.

JURISDICTION

The judgment of the court of appeals was entered on May 2, 2007. A timely petition for rehearing and rehearing en banc was denied on July 19, 2007 (Pet. App. 14a). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATEMENT

1. The Petitioner, Francisco Anibal Londono Gutierrez, is a native and citizen of Colombia who first entered the United States on or about December 27, 2001. (A.R. at 95, 466). The Petitioner entered the United States via Miami, Florida, by air with fraudulent documents. (A.R. at 466). The Petitioner was detained and a "credible fear" interview was administered pursuant to § 235(b) of the Immigration & Nationality Act (INA). (A.R. at 170-171). At his interview the

Petitioner expressed a fear of returning to Colombia because he had problems with the "Auto Defensas de Colombia" or "AUC," a paramilitary group. (A.R. at 170).

Specifically, the Petitioner testified that he was a businessman in Colombia. He had been the victim of excessive extortion and that another businessman was murdered after failing to adhere to the AUC's deadly requests. (A.R. at 170). Furthermore, the Petitioner stated that threats had been communicated to him prompting him to flee to the United States. (A.R. at 170-171). After an asylum officer found that Mr. Londono genuinely feared returning to Colombia he was released and placed in removal proceedings.

2. What transpired next is riddled with serious violations of due process rights. Section 208(a)(2)(B) of the INA requires that an applicant for asylum demonstrate that he or she has filed his application, Form I-589, within one year after the date of the alien's arrival in the United States. For applicants in Immigration Court proceedings, the Department of Homeland Security can move to pretermit the request for asylum for failure to file within the one year deadline. Here, Mr. Londono's deadline for filing his application for asylum was December 26, 2002. The Respondent was scheduled to appear for an initial Master Calendar Hearing on May 2, 2002. That notice was erroneously sent to 436 Meridian Street, Apt. 1, East Boston, MA 02128. (A.R. at 458). The correct address provided by the Respondent was 463 Meridian Street, Apt. 1, East Boston, MA 02128. The Court, noting the error, rescheduled the Respondent to appear for a Master Calendar Hearing on December 19, 2002. (A.R. at 457). Inexplicably, the Court next, sua

sponte, rescheduled the Respondent's initial Master Calendar Hearing and set it for July 31, 2003. (A.R. at 27), well after the one year deadline for the filing of an asylum application.[1]

On July 24, 2003, the Petitioner appeared before the Immigration Court represented by Attorney David Collier. The Immigration Judge reset the case to October 30, 3003, to file the I-589. (A.R. at 85-86). On October 30, 2003, the Petitioner again appeared before the Immigration Court. The Immigration Judge specifically asked Petitioner's counsel if there was any reason for the failure to file an asylum application prior to the one year filing deadline. (A.R. at 88). Petitioner's counsel responded, "No, Your Honor. No. This is—." (A.R. at 88). As a result, the Immigration Court construed Petitioner's counsel's response as a request for withholding only. The Petitioner was never afforded an opportunity to comply with the one year filing deadline because the Immigration Court without explanation rescheduled the Petitioner's Master Calendar Hearing.

On January 11, 2005, the Petitioner testified before the Immigration Court regarding the I-589 he had previously submitted. The Petitioner testified that he had obtained a high school diploma in Colombia and that he worked for a sports promotion in the municipality where he was born. (A.R. at 95). He further testified that

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1. It should also be noted that while the Court rescheduled the matter to July 31, 2003, the Petitioner appeared before the Immigration Court in Boston, MA, on July 24, 2003. (A.R. at 84-86). There is no evidence in the administrative record that any of the parties received an actual hearing notice for July 24, 2003. Nonetheless, all parties appeared and a hearing was conducted.

he entered the United States on December 27, 2001, via Miami, Florida, on a false passport and visa. (A.R. at 95-96). The Petitioner testified that he operated his own business, Granedo Polandur. (A.R. at 96). The Petitioner stated that he had to rush out of his country because he was in physical danger and his family was in danger. (A.R. at 97).

The Petitioner lived in an area where there was a significantly large presence of the AUC Paramilitary members (hereinafter AUC). (A.R. at 97). The Petitioner testified that he was approached by members of the AUC and that they requested payment of two thousand pesos. (A.R. at 97-98). The Petitioner was terrified, "green behind the ears". (A.R. at 97). He was told by other merchants similarly situated that this was the National Defense's territory and they always collected rent. (A.R. at 97-98). The Petitioner testified that he made these payments of 2000 pesos for approximately one year and six months when suddenly the price was raised to 200,000. (A.R. at 98). The Petitioner expressed his inability to meet such an exorbitant amount but these armed forces members replied that he "had to pay or pay the consequences or kidnappings". (A.R. at 99). These armed men of the AUC would enter his business, take supplies and money from the register. If the Petitioner denounced them to the police they said he would pay the costs at any measures. (A.R. at 99).

The Petitioner had no choice but to sell his business. Nevertheless, the Petitioner received a threatening letter demanding a percentage of the proceeds from the sale of his business or the original 200,000 pesos the AUC had previously requested. (A.R. at 100). Two months

after the sale of his business the Petitioner felt he had no choice but to leave his country, particularly since he felt that everywhere he went he encountered the presence of the armed forces. (A.R. at 101).

On cross examination there were some minor discrepancies elucidated by the Trial Attorney. For example, the Trial Attorney noted that Mr. Londono initially attempted to enter the United States on the false passport rather than immediately requesting asylum. (A.R. at 106). There were some differences regarding testimony given at the airport during the credible fear assessment and testimony given at the Individual Merits Hearing, mainly concerning the amount of money that the AUC demanded. Specifically, the Trial Attorney focused on the Petitioner's inability to meet the extortion demands of the AUC with his ability to pay for a fraudulent visa. (A.R. at). The Trial Attorney also inquired as to why the Petitioner's wife, who was not part of the proceedings, did not testify on his behalf. (A.R. at 109-110).

The Immigration Court, which is charged with sole jurisdiction over asylum claims, made no attempt to ensure that the Petitioner's right to due process was preserved. The Immigration Court denied the Petitioner's request for withholding of removal based on one internal inconsistency. Essentially, the Court noted that the Petitioner was unable to continue meeting the exorbitant demands of the AUC but was able to pay for a fraudulent visa. The Court notes that even if the Petitioner was internally consistent he had not shown that it was more likely than not that he would be tortured.

3. On appeal, the Petitioner's former counsel challenged only the denial of Petitioner's request for withholding of removal. The Board noted that Petitioner's counsel failed to raise any arguments related to the one year filing deadline and therefore adopts and affirms the decision of the [Petitioner's] application for withholding of removal on October 12, 2005. (A.R. at 48). There is an additional one-sentence in the Board's decision stating that they agree that the extortion was criminal in nature. (A.R. at 48).

After the Board dismissed the Petitioner's appeal a Motion to Reconsider, Motion to Reopen, and Motion for a Stay of Removal, were filed with the Board on November 10, 2005. Specifically, the Motion to Reopen addressed the Immigration Court's failure to schedule a hearing date for the filing of the asylum application pursuant to 8 U.S.C. § 208.4(b)(3). It addressed the numerous rescheduled hearings in this matter and the total deprivation of Mr. Londono's due process rights. He was never afforded an opportunity to exercise his right to fully prosecute his application for political asylum. Because the Immigration Court never attempted to determine if an exception existed to the one year filing requirement, Mr. Londono was effectively precluded from exercising his request for asylum. What is more, the Board completely skirts present counsel's critical issue—whether the Petitioner was deprived of due process when he was effectively prevented from timely filing an asylum application. (A.R. at 2). The Board's decision addresses only the issues raised in the Motion to Reconsider related to the withholding arguments. The serious procedural errors present since the inception of these proceedings warranted a remand to

the Immigration Court. The Immigration Court's oral decision cites one internal inconsistency and then denies withholding of removal. Moreover, the Board's complete failure to address all of the Petitioner's claim filed on November 10, 2005, also warranted a remand.

The First Circuit Court of Appeals dismissed Petitioner Francisco Londono's Petition for Review on May 2, 2007. In its judgment, the First Circuit states that Petitioner did not establish a colorable due process claim and, therefore, the Court lacked jurisdiction to review his challenge to the ruling that his asylum application was untimely. The Court further found substantial evidence in the record supporting the determination that petitioner failed to meet his burden to show entitlement to withholding of removal.

The instant petition followed.

REASONS FOR GRANTING THE PETITION

This Court should grant this petition for a writ of certiorari because the Petitioner's due process right to a full and fair hearing, as guaranteed by the 5th Amendment to the U.S. Constitution, has been denied as a result of a conflict between § 208 of the Immigration & Nationality Act and its corresponding regulations, combined with local operating rules and procedures implemented across the Immigration Courts in the United States. The First Circuit Court of Appeal's decision effectively grants Immigration Courts unfettered discretion to schedule hearings for asylum applicants beyond the one-year deadline that Congress established in § 208 of the I.N.A. for the filing of an

application for asylum and withholding of removal. The regulatory scheme as applied in this case and the First Circuit Court's decision granting the Immigration Courts such unfettered discretion to schedule asylum hearings clearly violate the statutory requirement established by § 208 of the I.N.A. to file within one-year. Furthermore, they frustrate Congressional intent to process asylum claims within a limited one-year time period. Petitioner's rights to due process and fundamental fairness were denied by the cumulative effect of the Immigration Court's procedural defects and error in scheduling Petitioner's hearing for asylum past the statutory one-year deadline. Given the increasing number of asylum applicants and the particular vulnerability of the nation's population of *pro se* refugees who must navigate through the impenetrable labyrinth of immigration laws passed by Congress, this conflict and resulting deprivation of due process are untenable.

A. The Regulatory Scheme Established by 8 C.F.R. § 208, 8 C.F.R. § 1003.18, and Immigration Court Processing Procedure Under Asylum Request Processing Provision XIII(c) Regarding the Filing of an Asylum Application In Removal Proceedings Violates Sec. 208 of the I.N.A.

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. 104-208, was enacted on September 30, 1996, and provided several changes to the Immigration & Nationality Act. Sec. 208 of the INA states that an alien who is physically present in the United States can file an application for political asylum. Pursuant to the statute, the alien must also demonstrate by *clear and convincing* evidence that he

or she filed the application for political asylum within one year of arrival to the United States. *See* § 208(a)(B).

Section 208 of the Code of Federal Regulations contains general procedures for asylum and withholding of removal. The procedures relate to jurisdiction, forms, and the filing of an asylum application. 8 C.F.R. § 208.2(b) grants exclusive jurisdiction to Immigration Judges over asylum applications filed by an alien who has been served with a Notice to Appear. The regulations further provide that for an alien in proceedings the filing date of the asylum application is the date it is served upon the Immigration Court. *See* 8 C.F.R. § 208.4(a)(2)(ii). An alien in removal proceedings cannot simply submit their asylum application to an Immigration Court Clerk. Local rules and operating policies are implemented at Immigration Courts across the country.

In Boston, Massachusetts, where the Petitioner's hearings were held, there are specific operating policies governing the filing of an asylum application by an alien in removal proceedings. Immigration Court Operating Policy and Procedure Memorandum, 00-01, Asylum Request Processing, Provision XIII(c), page 15, states: "For cases before the Immigration Court in accordance with Sec. 3.13 of this chapter, "asylum applications cannot be accepted through the clerk's office whether mailed or hand delivered." As a result of this constraining policy, an alien in removal proceedings must wait until the Immigration Court schedules his hearing. The Immigration Court has sole responsibility for scheduling cases and notifying the alien and the Government of the "time, place and date of hearing". *See* 8 C.F.R. § 1003.18(a).

In the instant matter, the Petitioner was paroled into the United States for the purposes of filing an asylum application on or about December 27, 2002. (A.R. at 95, 466). According to his parole date, the Petitioner had to file an I-589 Application for Political Asylum on or about December 26, 2003. Instead, what occurred was that a series of improper hearing notices were initially served. Thereafter, the Immigration Judge, ignoring his sole and exclusive functions of both receiving an asylum application and scheduling the date for the filing of an asylum application, inexplicably scheduled a Master Calendar Hearing beyond the one-year filing deadline.

Initially, Mr. Londono was scheduled to appear before the Immigration Court on May 19, 2002. (A.R. at 458). The notice was erroneously sent to an incorrect address. The Immigration Court, promptly noting the error, sent a rescheduled hearing notice to Mr. Londono's appropriate address and scheduled him to appear on December 19, 2002, or four months later from the initial hearing but seven days before Mr. Londono's one-year filing deadline. (A.R. at 457). Without explanation, the Immigration Court, upon its own authority, reschedules yet again this time to July 31, 2003, seven months past the one-year deadline. When the Petitioner finally appears in court the Immigration Court, which was in control of scheduling Mr. Londono's Master Calendar Hearing for purposes of properly filing the asylum application, proceeds with a Withholding of Removal Application *only*.

In determining whether Mr. Londono's statutory right to a full and fair hearing was violated, the particulars of this matter reveal that it was so violated.

The REAL ID Act deprived the courts of appeals of jurisdiction over discretionary or factual determinations. *See Mehilli v. Gonzales*, 433 F.3d 86, 93 (1st Cir. 2005). Recently, in *Hayek v. Gonzales*, the First Circuit Court of Appeals determined that it did not have jurisdiction to review whether or not an asylum application was timely filed. 145 F.3d 501 (1st Cir. 2006). That case involved a Lebanese individual who filed an asylum application ten years after her initial entry date and argued "changed circumstances" as an exception to the one-year filing deadline. *See Hayek*, at 503. Because *Hayek* involved a factual determination as to whether or not there were changed circumstances in her native country, the First Circuit Court declined review. Here, Mr. Londono submits that the regulatory scheme for filing an asylum application in Immigration Court frustrates the purpose of § 208 of the INA.

Section 208 of the INA specifically grants aliens physically present in the United States the right to file an asylum application. The statute further places the burden of proof on the alien to establish that he or she filed the asylum application within one year of arrival by "clear and convincing" evidence". Here, Mr. Londono was at the mercy of the Immigration Court's ability to schedule his hearing within one year. Mr. Londono was granted a humanitarian parole because of the extraordinary circumstances he presented at the airport in Miami, FL, namely, that he presented a credible fear of returning to his native country. (A.R. at 170-171). What happened next deprived Mr. Londono of his right to properly file an asylum application. The regulations governing the mechanism for filing an application are contrary to the spirit of § 208 of the INA granting aliens

physically present in the United States the right to file an I-589 within one year of arrival.

In enacting § 208 of the INA, Congress intended to grant refugees the right to request asylum within one year of arrival. For those aliens not in removal proceedings, the ability to file is accomplished by filing it with the Service Center in their jurisdiction. For those aliens in removal proceedings, the regulations have shown that their ability to file their applications is constrained by their particular Court's time constraints. The number of cases backlogged at Immigration Courts across the country is rising every day and create potentially serious problems, especially for *pro se* refugees who must file their application for asylum before an Immigration Court where the clerk has discretion to select any date on which to schedule the applicant's hearing.

The Supreme Court has determined that the judiciary is the "final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent." *INS v. Cardoza-Fonseca*, 480 U.S. at 447-48 (1992) (quoting *Chevron USA, Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (Sup. Ct. 1984)). The Petitioner need not raise these statutory construction and constitutional issues before the Immigration Judge or the Board since they have no jurisdiction for review. *See McCarthy v. Madigan*, 112 S. Ct. 1081, 1086 (S. Ct. 1992); *see also Matthews v. Eldridge*, 424 U.S. at 328-30 (holding that exhaustion not required when there is a constitutional challenge to an administrative action).

In the matter at hand, the regulatory scheme frustrates clear congressional intent. When Congress has left a gap in a statute to be filled by the agency, the courts will usually defer to the agency's regulation unless it is clearly in error or *irrational. See Chevron*, at 843-844. However, if the statute is clear on its face then the principle of deference is not applicable. *See INS v. St. Cyr*, 121 S. Ct. 2271, 2290 n.45 (2001). Here, the statute clearly provides an alien with an opportunity to file their asylum application within one year of arrival into the United States. Nonetheless, the regulations at hand prevent an alien from exercising their rights. Mr. Londono was unable to comply with the requirements of § 208 until the court scheduled a hearing. Because the hearing was scheduled beyond the filing deadline, Mr. Londono was unable to demonstrate by "clear and convincing evidence" that he filed his Form I-589 within one year of arrival. The regulatory requirement that an application be considered filed when it is served upon the "Immigration Court" is "arbitrary, capricious, and manifestly contrary to the statute." *Succar v. Ashcroft*, at 23 (quoting *Chevron USA, Inc.*, at 843-44). The regulations create an unlawful scenario for refugees who have to wait until an Immigration Judge schedules their hearing date—which, under the regulations, may be after the statutory one-year filing deadline.

As the regulations were applied to the instant case, Mr. Londono was deprived of an opportunity to participate in a full and fair hearing with respect to his asylum application. Because the regulations and the Court's decision to schedule an Initial Master Calendar Hearing beyond the one year deadline, Mr. Londono was subjected to a much higher standard—withholding of

removal—where he had to demonstrate that it was more likely than not that he would be persecuted upon a return to his native country.

The Petitioner respectfully requests that the regulatory scheme and corresponding local procedures for filing of asylum applications, which grant unfettered discretion to Immigration Courts to schedule hearings on the merits of an asylum application, are held to be inconsistent with and contrary to the statutory provisions of § 208 of the I.N.A.

B. As a Result of Application of the Regulatory Scheme for Asylum Filing to the Petitioner, the Petitioner was Deprived of His Due Process Right to Participate in a Full and Fair Hearing as Guaranteed to Him by the 5th Amendment of the U.S. Constitution, which was Fundamentally Unfair

The Due Process Clause of the Fifth Amendment to the U.S. Constitution "requires that aliens 'threatened with deportation' are provided with the right to 'a full and fair hearing.'" *See Reyes-Melendez v. INS*, 342 F.3d 1001 (9th Cir. 2003). "As part of a right to a full and fair hearing, an alien is entitled to a 'reasonable opportunity to present evidence on his behalf.'" *Id.* In order to obtain relief for a violation of procedural due process rights in immigration proceedings, an alien must show that the violation prejudiced him. To demonstrate prejudice, an alien need demonstrate that the IJ's conduct only "potentially . . . affected the outcome of the proceedings." *Id.* at 16 (citing *Campos-Sanchez v. INS*, 164 F.3d 448, 450 (9th Cir. 1999)). Some circuit courts require a higher

standard, such that a "reasonable likelihood" exists that the due process violation prevented the Petitioner from gaining relief from deportation. *United States v. Aguirre-Tello*, 353 F.3d 1199 (10th Cir. 2004). Fundamental precepts of due process have been construed such that an alien wishing to challenge a deportation order must satisfy three requirements: that "(1) he exhausted any administrative remedies that may have been available; (2) the hearing effectively eliminated the right of the alien to obtain judicial review from that proceeding; and (3) the prior hearing was fundamentally unfair." *United States v. Charleswell*, 456 F.3d 347 (3d Cir. 2006).

Additionally, it has been held that where one has had a "full opportunity to present his case" and a "fundamentally fair hearing," a claim of denial of due process is unfounded. *Hasanaj v. Ashcroft*, 385 F.3d 780, 785 (7th Cir. 2004); *see also United States v. Palacios-Martinez*, 845 F.2d 89 (5th Cir. 1988). However, misleading information and repeated procedural defects on the part of an immigration court may have the cumulative effect of denying due process and fundamental fairness. *United States v. Aguirre-Tello*, 353 F.3d at 1210 (J. Holloway and J. Seymour, dissenting).

Under 8 U.S.C. § 1158(a)(2)(B), a "clear and convincing" burden is placed on asylum applicants to file their application within "1 year after the date of the alien's arrival in the United States." The Respondents' regulations clearly establish that Immigration Courts have the sole responsibility for scheduling cases and notifying the alien and the Government of the "time,

place and date of hearing." *See* 8 C.F.R. § 1003.18(a). Additionally, an individual in Immigration Proceedings is required to file his application for asylum with the Immigration Court, which "can only be filed with the Immigration Court at a Master Calendar or a Master Calendar Reset Hearing." *See* Immigration Court Operating Policy and Procedure Memorandum, 00-01, Asylum Request Processing, Provision XIII(c), page 15.

In the present case, there is no question that the application of the regulatory and policy scheme established by the Respondent to Petitioner's case has prevented the Petitioner from receiving a full and fair hearing on the merits of his asylum application. The Petitioner was at the mercy of the Respondents' policies and procedures in order to meet his burden of filing his asylum application within the statutory period. Through the course of the Petitioner's immigration proceedings, the Petitioner attempted to file his asylum application. However, the immigration court rescheduled his master hearing on two occasions, past the one-year deadline established by § 208 of the I.N.A. The Immigration Court's delay in scheduling Petitioner's Master Hearing effectively deprived the Petitioner of his right to file his asylum application. The Petitioner was not afforded a "reasonable opportunity to present evidence on his behalf"—rather, he was afforded no opportunity to present evidence on his behalf.

The Petitioner has been prejudiced by the deprivation of his right to a hearing because the outcome of his case was potentially affected. Being subject to a final order of the Board after not being afforded a full and fair hearing, the Petitioner is now subject to removal

from the United States, which has been his home over the past five years. Asylum, withholding of removal, and the protection under the Convention Against Torture ("CAT") are substantially different claims. Asylum is a much less stringent standard than withholding of removal and CAT. The Respondents' own statistic shows that the rate of approval for asylum applications is 38%, while withholding of removal is only approved at a rate of 13%. *See* FY 2005, Statistical Year Book, Prepared by the Office of Planning, Analysis, & Technology, February 2006.

Even under the higher standard adopted by some circuit courts that there be a "reasonable likelihood" that the due process violation prevented the Petitioner from gaining relief from deportation, the Petitioner had a reasonable likelihood of showing he had a well-founded fear of persecution on account of his social group. The AUC paramilitaries in Columbia targeted the Petitioner for excessive extortion. They murdered another individual who refused to comply with their demands, and they directly threatened the Petitioner. *See also United States v. Aguirre-Tello*, 353 F.3d 1199 (10th Cir. 2004).

The Petitioner has satisfied fundamental precepts of due process to show that (1) he exhausted any administrative remedies that may have been available because he pursued a final order of the Board of Immigration Appeals, (2) the hearing scheduled by the Immigration Court effectively eliminated his right to obtain judicial review because the one-year deadline had passed through no fault of his own, and (3) the prior hearing was fundamentally unfair because it was

scheduled after the one-year deadline for Petitioner's asylum application. *See United States v. Charleswell*, 456 F.3d 347 (3d Cir. 2006) (where misleading language contained in a reinstatement notice of intent form, and the Immigration and Naturalization Service's failure to inform the immigrant of his statutorily prescribed right to seek an appeal of his reinstatement order, was a fundamental defect of the nature that, if prejudicial, rendered the proceeding fundamentally unfair). Analogous to misleading language on a notice of intent form, the notice of a hearing form misled Petitioner to think that his asylum application remained timely when the Court scheduled his hearing past the one-year deadline. *See id.* Petitioner's resulting status of being subject to deportation is fundamentally unfair.

Moreover, because Petitioner has been denied a "full opportunity to present his case" at a "fundamentally fair hearing," his claim of deprivation of due process is well-founded. Compare *Hasanaj v. Ashcroft*, 385 F.3d 780, 785 (7th Cir. 2004)(where due process claim was held to be unfounded because applicant had full opportunity to present case); compare also *United States v. Palacios-Martinez*, 845 F.2d 89 (5th Cir. 1988) (where defects in an earlier deportation proceeding did not deprive appellant of a fundamentally fair hearing). Additionally, the Immigration Court's scheduling of Petitioner's hearing past the one-year deadline created information that was misleading for Petitioner, indicating that his application would still be valid with a hearing date beyond the one-year deadline. *See United States v. Aguirre-Tello*, 353 F.3d at 1210 (J. Holloway and J. Seymour, dissenting) (stating that misleading references by an immigration judge on Petitioner's eligibility for a

"pardon" and other procedural defects resulted in the cumulative effect of denial of Petitioner's rights to due process and fundamental fairness). In the instant case, the Immigration Court's repeated procedural defects resulting from this misleading information and the incorrect address on Petitioner's hearing notice have had the cumulative effect of denying Petitioner due process and fundamental fairness. *See id.*

Furthermore, the regulations and policies established by the Respondent that allow the Immigration Courts unfettered discretion in scheduling cases are contrary to Congress' intent in establishing the one-year asylum filing deadline. Clearly, Congress would not have established the burden and requirement to file within one year if an individual would be procedurally unable to file the application because an Immigration Court scheduled his hearing past the one-year deadline. The regulations and procedures established by the Respondent have effectively deprived the Petitioner of a full and fair hearing on the merits of his asylum application.

Additionally, the Immigration Judge indicated that the Petitioner did not qualify for withholding of removal since he did not establish persecution or fear of persecution based on account of political opinion. However, the Petitioner had attempted to file for asylum and had filed for withholding of removal based on more than one of the five enumerated groups (race, religion, nationality, membership in a particular social group or political opinion). The Petitioner's application also included social group as one of the enumerated grounds of persecution. There have been numerous cases that

have established that an individual being extorted for money can establish persecution based on a distinct social group. *See Matter of Acosta*, 19 I.&N. Dec. 211, 233; and *Tapiero de Orejuela v. Gonzales*, 423 F.3d 666, 672 (7th Cir. 2005) (where the Seventh Circuit applied the social group test from *Acosta* to hold that Petitioners "fell into a distinct social group: the educated, landowning class of cattle farmers targeted by FARC, noted in the State Department's Country Report as among the guerrillas' 'preferred victims.' This group was not defined merely by wealth, but by ownership of land, social position as cattle farmers, and their education"; and Petitioner's persecution was marked by a murder, repeated attempts at extortion, and various death threats).

In this instance, the Petitioner is part of that social group that was specifically targeted by guerilla groups in Colombia. The AUC paramilitaries in Columbia targeted the Petitioner for excessive extortion. They murdered another individual similarly situated to Petitioner who refused to comply with the monetary demands they were making on Petitioner, and they directly threatened the Petitioner with deadly force and kidnapping. Specifically, the Petitioner testified that he was approached by members of the AUC and that they requested payment of two thousand pesos. (A.R. at 97-98). The Petitioner was terrified, "green behind the ears". (A.R. at 97). Petitioner was told by other merchants similarly situated that he was on the National Defense's territory and they always collected rent. (A.R. at 97-98). The Petitioner testified that he made these payments of 2000 pesos for approximately one year and six months when suddenly the price was raised to

200,000. (A.R. at 98). The Petitioner expressed his inability to meet such an exorbitant amount but these armed forces members replied that he "had to pay or pay the consequences or kidnappings". (A.R. at 99). These armed men of the AUC would enter his business, take supplies and money from the register. If the Petitioner denounced them to the police they said he would pay the costs at any measures. Petitioner felt that everywhere he went he encountered the presence of the armed forces. Petitioner had to rush out of his country because he was in physical danger and his family was in danger. (A.R. at 101). Therefore, Petitioner put forth evidence of a well-founded fear of persecution based on account of his social group to show entitlement to withholding of removal.

In the interests of fundamental fairness, Petitioner respectfully requests that he be granted his due process right to a full and fair hearing on the merits of his asylum application.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT DATED MAY 2, 2007

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 05-2711

FRANCISCO LONDONO GUTIERREZ,

Petitioner,

v.

ALBERTO R. GONZÁLES,
ATTORNEY GENERAL,

Respondent.

Before
Torruella, *Circuit Judge*,
Stahl, *Senior Circuit Judge*,
and Howard, *Circuit Judge*.

JUDGMENT

Entered: May 2, 2007

Petitioner Francisco Londono Gutierrez seeks review of the Board of Immigration Appeal's (BIA) final order of removal of October 12, 2005. We *grant* petitioner's recently filed motion for leave to supplement

his brief, After thoroughly reviewing the parties' briefs and record before the court, we conclude that petitioner has not established a colorable due process claim and, therefore, we lack jurisdiction to review his challenge to the ruling that his asylum application was untimely. *See Ishak v. Gonzales*, 422 F.3d 22, 31 (1st Cir. 2005); *Ravindran v. INS*, 976 F.2d 754, 762 (1st Cir. 1992). We further find substantial evidence in the record supporting the determination that petitioner failed to meet his burden to show entitlement to withholding of removal. *Sharari v. Gonzales*, 407 F.3d 467, 473-74 (1st Cir. 2005).

Accordingly, the petition for review is *denied.*

By the Court:
Richard Cushing Donovan, Clerk.

By: s/ [illegible]
Chief Deputy Clerk.

APPENDIX B — ORDER OF THE UNITED STATES DEPARTMENT OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW DATED DECEMBER 12, 2005

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A79-430-081 – Boston

In re: LONDONO GUTIERREZ, FRANCISCO ANIBAL IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: DESMOND P. FITZGERALD

ORDER:

PER CURIAM. The respondent moves the Board pursuant to 8 C.F.R. § 1003.2 to reconsider our decision dated October 12, 2005. A motion to reconsider shall specify the errors of fact or law in the prior Board decision and shall be supported by pertinent authority. See 8 C.F.R. § 1003.2(b)(1). The respondent has not complied with reconsideration standards and is merely rearguing the merits of his appeal. The respondent left Colombia because of the extortionate demands of a paramilitary organization. In our last decision we agreed

that the respondent failed to demonstrate that the reported extortion was other than criminal in nature. See INS v. Elias-Zacharias, 502 U.S. 478 (1992). See Matter of T-M-B-, 21 I&N Dec. 775 (BIA 1997) (criminal extortion efforts do not constitute persecution on account of political opinion where it is reasonable to conclude that those who threatened or harmed respondent were not motivated by political opinion), rev'd, Borja v. INS, 175 F.3d 732 (9th Cir. 1999); Matter of V-T-S-, 21 I&N Dec. 792 (BIA 1997) (not persecution where perpetrators were motivated by victim's wealth). Accordingly, the motion is denied.

s/ Roger Paul
FOR THE BOARD

APPENDIX C — ORDER OF THE U.S. DEPARTMENT OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW DATED OCTOBER 12, 2005

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A79-430-081 – Boston

In re: FRANCISCO ANIBAL LONDONO GUTIERREZ
a.k.a. Jaime Gonzalez

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Carlos Magaletta, Esquire

CHARGE:

Notice: Sec. 212(a)(6)(C)(i), I&N Act
[8 U.S.C. § 1182(a)(6)(C)(i)] –
Fraud or willful misrepresentation of material fact

Sec. 212(a)(7)(A)(i)(I), I&N Act
[8 U.S.C. § 1182(a)(7)(A)(i)(I)
Immigrant – no valid immigrant visa or entry document

Appendix C

APPLICATION: Asylum; withholding of removal; Convention Against Torture

ORDER:

PER CURIAM. The respondent appeals from the January 11, 2005, decision of the Immigration Judge insofar as it denied his application for withholding of removal. The respondent has not challenged the Immigration Judge's rulings that his application for asylum was not timely filed and that he failed to demonstrate eligibility for protection under the Convention Against Torture. We adopt and affirm the Immigration Judge's decision regarding the respondent's application for withholding of removal under section 241(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1231(b)(3), referred to by the respondent under the prior law of section 243(h) of the Act. *See Matter of Burbano*, 20 I&N Dec. 872, 874 (BIA 1994) (noting that adoption or affirmance of a decision of an Immigration Judge, in whole or in part, is "simply a statement that the Board's conclusions upon review of the record coincide with those which the Immigration Judge articulated in his or her decision"). In reaching this conclusion, we agree that the respondent has failed to demonstrate that the reported extortion was other than criminal in nature. Consequently, he has failed to carry his burden of proof with respect to establishing that it would be more likely than not that he would be persecuted on account of a protected ground or tortured upon return to Colombia.

Appendix C

Accordingly, in view of the above, the appeal is dismissed.

s/ [illegible]
FOR THE BOARD

APPENDIX D — ORAL DECISION OF THE U.S. DEPARTMENT OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, IMMIGRATION COURT, BOSTON, MASSACHUSETTS DATED JANUARY 11, 2005

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR
IMMIGRATION REVIEW
IMMIGRATION COURT
Boston, Massachusetts

January 11, 2005

File A 79 430 081

In the Matter of

FRANCISCO ANIBAL LONDONO GUTIERREZ,

Respondent

IN REMOVAL PROCEEDINGS

CHARGES: Section 212(a)(6)(C)(i) of the Immigration and Nationality Act – fraud. Section 212(a)(7)(A)(ii) of the Immigration and Nationality Act – not in possession of a valid travel document.

APPLICATIONS: Asylum, withholding of removal, withholding of removal under the Convention Against Torture.

Appendix D

ORAL DECISION OF THE IMMIGRATION JUDGE

Introduction

The respondent is a 33-year-old native and citizen of Columbia. The Government has charged the respondent in a Notice to Appear as referenced above. Respondent, through counsel, admitted the allegations and conceded the charge of removability. Accordingly, the Court finds by clear, convincing and unequivocal evidence that the respondent is removable and directs the country of Columbia as the country of removal. The respondent has applied for relief in the form of asylum under Section 208 of the Immigration and Nationality Act. Applications for asylum shall also be considered applications for withholding under Section 241(b)(3) of the Act. The Court also considers the respondent's application for withholding or removal under the Convention Against Torture.

Statement of the Law

The burden of proof is upon the respondent to show that he is eligible for asylum or withholding of removal. There is a one year deadline pursuant to Section 208 of the Act for the filing of an application for asylum absent a showing of extraordinary circumstances or changed country conditions. To qualify for asylum under Section 208 of the Act the respondent must show that he's a refugee within the meaning of Section 101(a)(42)(A) of the Act. The definition of refugee includes the requirement that the respondent show that he has

suffered either past persecution or that he has a well-founded fear of future persecution on account of race, religion, nationality, membership in a particular social group or political opinion. In analyzing the respondent asylum claim the Court will follow the regulations found in 8 C.F.R. Section 208.13(b). An asylum application shall be deemed to constitute at the same time an application for withholding of removal. The burden of proof upon an alien to qualify for a grant of withholding of removal is higher than that for asylum in that the alien must demonstrate a clear probability of persecution in the country designated for deportation on account of one of the protected grounds of the Immigration and Nationality Act whereas for asylum the alien need only show that a reasonable person in their circumstance would fear persecution. The clear probability standard makes it incumbent upon the alien to demonstrate that it is more likely than not that they would be subject to persecution if returned to the country from which they seek withholding of deportation.

Facts

The respondent testified at the merits hearing with regard to this matter and also submitted a detailed written statement in support of his application for asylum and withholding of removal. He states that he was born, raised and educated in the country of Columbia. Upon graduation from high school in the year 1992 he worked for a time in the field of sports promotion in his home town. The respondent states that in either 1996 or 1997 he traveled to the United States hoping to make a better

life for himself. After a couple of years the respondent returned home to Columbia and became self-employed operating a cart from which he sold food items and also household supplies. The respondent states that at some point he was approached by members of the AUC, a paramilitary group within the country of Columbia and payments of $2,000 per month were demanded from him by these individuals in order for him to continue in his business. The respondent states that he consulted with other business owners in the area and upon their advice decided to pay this amount. After while, however, the respondent states that the demands were raised from 2,000 pesos per month to a much higher amount of 200,000 pesos per month. The respondent offered his opinion that this was the equivalent of approximately 90 U.S. dollars per month, a sum which he found to be exorbitant. The respondent states that he was unable to pay this amount and thereafter these paramilitary individuals would help themselves to money from his cash receipts and also to goods from the business which they indicate to him they used in order to support their paramilitary efforts. The respondent states that after a few months of this he was forced to abandon his business and went into hiding. He states that in December of 2001, he traveled to the United States utilizing a false passport in another individual's name which he had purchased in the city of Cali, Columbia for the amount of $4,000 American. Respondent states that he fears returning to Columbia and believes that he would be killed within 10 or 15 days of his return to Columbia apparently as a result of his failure to pay the amount which had been attempted to be extorted from him.

Appendix D

Analysis and Findings

The first matter for the Court's consideration is the one year deadline for the filing of an application for asylum. The respondent arrived in the United States as stated above on or about December 27th, 2001, but did not file an application for asylum until October of 2003, approximately two years later. The respondent has offered no explanation to justify the failure to meet the one year deadline. Accordingly, the respondent's application for asylum is denied as it was not filed as required by law within one year of his arrival in the United States. Moving on to the respondent's application for withholding. The Court must first consider whether the respondent's testimony was credible. The Court finds that the respondent's testimony was not credible as it was internally inconsistent and also inconsistent as well with certain information which was contained in his written statement. For instance, the respondent indicated that he was apparently unable or unwilling to pay approximately $90 U.S. in order to continue with his business described above, however, the respondent apparently had no problem paying a vastly larger amount of $4,000 American in order to purchase a false passport in an effort to enter the United States illegally. Even if the respondent's testimony were to be found to be credible the Court finds that the respondent has not met his burden of proving that it is more likely than not that he would be tortured or persecuted if he were to return to Columbia. Even accepting his story at face value, at most the respondent has apparently paid relatively minor sums which were extorted from him by a so-called paramilitary organization. The respondent has suffered no physical

harm to this point. Further, the Court is mindful of the information contained in Exhibit 7 of the record of proceeding which indicates that the paralegal group which demanded these extortion sums from him apparently is in the process of demobilizing and laying down their arms at the present time. Accordingly, the respondent's application for withholding of removal under the provisions of the Immigration and Nationality Act is also denied. Since the respondent has failed to meet his burden of proof with regard to either asylum or withholding, the Court now considers his claim under the Convention Against Torture. There's no evidence that the respondent would be singled out for torture by the Government of Columbia if he were to return to Columbia. Accordingly, this application as well is denied.

THE ORDER

IT IS HEREBY ORDERED that the respondent's application for asylum and withholding under the provisions of the Immigration and Nationality Act are denied.

IT IS FURTHER ORDERED that the respondent's application for withholding of removal under the Convention Against Torture is denied.

IT IS FURTHER ORDERED that the respondent be removed to the country of Columbia.

s/ Paul M. Gagnon
PAUL M. GAGNON
United States Immigration Judge

APPENDIX E — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT DENYING PETITION FOR REHEARING ENTERED JULY 19, 2007

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 05-2711

FRANCISCO LONDONO GUTIERREZ,

Petitioner,

v.

ALBERTO R. GONZALES,
ATTORNEY GENERAL,

Respondent.

Before

Boudin, *Chief Judge*,
Torruella, *Circuit Judge*,
Stahl, *Senior Circuit Judge*,
Lynch, Lipez and Howard, *Circuit Judges*.

ORDER OF COURT

Entered: July 19, 2007

Before the court is Petitioner Francisco Londono Gutierrez's timely filed petition for rehearing, pursuant to Fed. R. App. P. 40, and petition for rehearing en banc, pursuant to Fed. R. App. P. 35(b)(1)(A). The petition

raises no new claims, evidence, or points of law that the court did not already consider, and dismiss, in his original petition for review. Accordingly, for the reasons already articulated in our May 2, 2007 judgment, we deny petitioner's request. The petition for rehearing having been denied by the panel of judges who decided the case and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing and petition for rehearing en banc be *denied.*

By the Court:
Richard Cushing Donovan, Clerk.

By: s/ Margaret Carter
Chief Deputy Clerk.